

Episode 52: Summary

Episode name: Expertly Prepared - Making or Breaking Expert Evidence

Guest(s): Matthew Hudson

What area(s) of law does this episode consider?

Selecting and briefing independent experts.

Why is this topic relevant?

Expert evidence can make or break a case. Since an expert is independent they shouldn't be told what answer to reach, but asking the right questions, outlining assumptions, and selecting the right expert are all key steps to ensuring success.

What legislation is considered in this episode?

Uniform Civil Procedure Rules 2005 (NSW), Sch 7

Evidence Act 1995 (NSW)

Federal Circuit and Family Court of Australia (Family Law) Rules 2021 (Cth)

What cases are considered in this episode?

Makita Australia Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305

- In *Makita*, the NSWCA held that for an expert opinion to be admissible it must be agreed or demonstrated that there is a field of specialised knowledge in which the witness has become an expert by virtue of specified training, study, or experience.

Honeysett v The Queen (2014) 253 CLR 122; [2014] HCA 29

- A body mapping expert gave evidence that he could identify an accused from CCTV footage based on his specialised knowledge of human anatomy. The HCA held that the evidence was inadmissible as expert opinion evidence because his view was based on a subjective impression of what he saw and that this subjective impression was not wholly or substantially based on specialised knowledge.

What are the main points?

- In insolvency litigation, there are a multitude of experts across a range of areas that may be beneficial. This includes auctioneers, insolvency experts, real estate agents and business valuers. The first step in a successful expert witness engagement is identifying the right kind of expert you need.
- Expert witnesses have a paramount duty to the court to remain objective and unbiased. Shadow experts can be useful, where the costs permit, to identify methodology issues and omissions in another expert's report and to advise a party without being restricted by independence standards or an overriding duty to the court.
- In family law matters, the single expert rules apply. As with any type of single expert, it may be difficult to obtain clear joint instructions which is why it's essential to have an upfront and direct conversation with the instructing parties and/or solicitors at the start of the engagement.

What are the practical takeaways?

- When engaging an expert, asking the right questions is key to a productive working relationship. Instructing solicitors should make sure they have stated the assumed facts and included relevant documents in bundles to the expert.
- As a litigant cross-examining the other side's expert, it's likely that they will have solid qualifications and you won't have the expert knowledge to attack their conclusions, meaning challenging their assumptions is going to be the most fruitful approach. Asking the expert to consider an alternate scenario where one of their assumptions doesn't work is a strategic way to get them to side with your own expert's evidence.

Show notes

[APES 110 'Code of Ethics for Professional Accountants'](#)

[The Law Society of NSW Young Lawyers 'The Practitioner's Guide to Briefing Experts' \(2018\)](#) (PDF download)